

# Overview of FOIA Exemptions

# Exemption 1

- 5 U.S.C. § 552(b)(1) protects material that is properly classified in the interests of national defense or foreign policy
- Agencies mark certain material as “classified” pursuant to Executive Order 12,958, as amended on March 25, 2003
- May classify after receipt of FOIA request- § 1.7(c) (procedures to follow)



# Exemption 1

- Executive Order 12958, as amended:
  - Substantive Criteria:
    - Seven classification categories
    - New additions to classification categories:
      - “Transnational Terrorism”--§§ 1.4(e) & (g);
      - “Infrastructures”--§ 1.4(g);
      - “Weapons of mass destruction”--§ 1.4(h)
      - Presumption for classification of “Foreign Government Information”--§1.1(c)

# Exemption 1

- Three levels of classification: top secret, secret, and confidential
- Pertain to the degree of damage that will result from an unauthorized disclosure of the information
  - Procedural Criteria:
    - For a document to be properly classified, someone with original classification authority has to mark it at the appropriate level



# Exemption 1

- “For Official Use Only” (FOUO) does not automatically mean that a document is classified.
- Exceptions to Classification:
  - to conceal violations of law, inefficiency or administrative error;
  - to prevent embarrassment to a person, organization or agency;
  - to prevent or delay release of information that does not require protection in the interest of national security

# Exemption 1

- Deference to agency expertise
- Glomar Response:
  - Provides for an agency to refuse to confirm or deny the existence or nonexistence of requested information whenever its existence or nonexistence is itself classified
- Compilation/mosaic principle
  - This is the concept that apparently harmless pieces of information, when assembled together, could reveal a damaging picture

# Exemption 2



- 5 U.S.C. § 552(b)(2) protects records that are “related solely to the internal personnel rules and practices of an agency”
- Two aspects to Exemption 2:
  - “Low 2” and “High 2”
    - “Low 2” covers trivial information of no public interest, such as awards, travel expenses, parking facility rules, file numbers, data processing notations (Senate Intent)

# Exemption 2

- “High 2” covers more substantive information, such as operating rules and guidelines; manuals for investigators, auditors and examiners; computer security plans; examination questions and answers; homeland security-related information (House intent)



# Exemption 2

- Threshold Requirements:
  - Information must be **predominantly internal** in nature--this means that the information is not widely disseminated
  - Information relates to personnel rules and practices of an agency
  - Courts willing to stretch this threshold when dealing with law enforcement material

# Exemption 3

- 5 U.S.C. § 552(b)(3) incorporates the disclosure prohibitions that are contained in various other federal statutes
- Exemption 3's protection is generally triggered only by federal statutes NOT by Executive Orders or reg



# Exemption 3

- Exemption 3 protects information that is prohibited from disclosure by another statute, if the statute either:
  - (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or
  - (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld

# Exemption 3

- Different types of statutes:
  - Require withholding—means that there is an absolute prohibition on disclosure (NO agency discretion)
    - Example: Census Act
  - Limited prohibition on disclosure—means that there is some discretion in release of information, but there are **guidelines and criteria** to follow



# Exemption 3

- Examples of Exemption 3 statutes used in DoD:
  - 10 U.S.C. § 130b—used to protect the names of DoD personnel in overseas, sensitive or routinely deployable units;
  - 10 U.S.C. § 139c—used to protect certain sensitive information of foreign governments and international organizations (Red Cross);
  - 10 U.S.C. § 2305(g)—used to protect contractor proposals that are not incorporated into contract

# Exemption 4

- 5 U.S.C. § 552(b)(4) protects trade secrets and commercial or financial information obtained from a person, and privileged or confidential
- Two elements:
  - Trade secrets; or
  - Commercial or financial information; and
    - Obtained from a person AND
    - Privileged or confidential



# Exemption 4

- Trade Secret is defined broadly to encompass any process or device for continuous use in the operation of a business—formula; design drawing of plane fuel pump
- Trade secret protection is rarely invoked.
- Commercial or financial information has the ordinary meaning

# Exemption 4

- **Commercial** means related to or deals with business or commerce
- **Financial** means applies to business economics or financial data and personal financial information—business sales statistics; research data; technical designs; customer supplier lists; profit/loss data; overhead/operating costs; information on financial condition



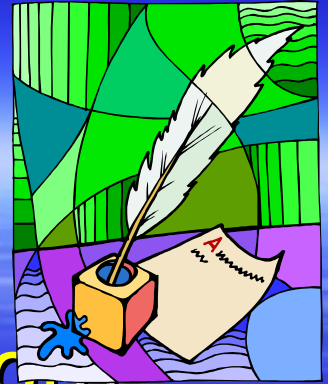
# Exemption 4

- “Obtained from a person” includes most entities (corporations, state governments, agencies of foreign governments and non-profit organizations), BUT NOT the U.S. government
- “Privileged” refers to general discovery privileges, including attorney work product privilege, attorney-client privilege, and critical self-evaluative privilege

# Exemption 4

- “Confidential” information comes in two forms:
  - Voluntary submissions—would the submitter routinely release this information to the public?
  - Required submissions—submitter must submit the information to enjoy benefits of participation in govt. contract/program
- Submitter Notice—Executive Order 12,600
  - Reverse FOIA lawsuits

# Exemption 5



- 5 U.S.C. § 552(b)(5) protects from mandatory disclosure intra or inter-agency memorandum or letters that would not be available by law to a party in litigation with the agency
- In other words, Exemption 5 protects privileged information
- Threshold requirements must be met

# Exemption 5

- Threshold: Intra or inter-agency memorandums or letters that are not available in civil discovery
  1. What does “intra or inter-agency” mean?
    - Outside Consultant Test
    - Department of Interior v. Klamath Water Users Protection Ass’n, 532 U.S. 1 (2001)
  2. “Memorandums or letters”--this part of the threshold covers all records in your files
    - “records” also includes electronic records



# Exemption 5

- Threshold:
- 3. “Available by law to a party in litigation”--this means that you would be able to receive this information through civil discovery
- Common civil discovery privileges:
  - Deliberative process privilege
  - Attorney work product privilege
  - Attorney-client privilege

# Deliberative Process Privilege

- Two requirements:
  - The information is **predecisional**; this is a timing question--was the document created prior to the adoption of an agency policy;
  - The information is **deliberative**; this is a character question--does the document contain advice, recommendations, analysis, suggestions, or opinions

# Deliberative Process Privilege

- Generally, facts cannot be protected under the deliberative process privilege
- Drafts: If a document is a draft, you can protect it all, including the facts, even if the draft is identical to the final version of the document.
- Stamping a document “Draft” will not on its own provide protection

# Attorney Work Product Privilege

- The attorney work product privilege is designed to protect the adversarial trial process by insulating attorney's preparation
- Two requirements:
  - The information was prepared by an attorney or at his or her direction;
  - The information was prepared in the anticipation of litigation



# Attorney Work Product Privilege

- Litigation does not have to occur, but there must have been a concrete possibility
- Includes civil, criminal and administrative litigation
- No temporal limitations—protection does not end when litigation is over
- Facts can be protected under this privilege

# Attorney-Client Privilege

- The attorney-client privilege was designed to encourage clients to disclose everything to his or her attorney when seeking legal advice.
- This privilege protects confidential communications between an attorney and client regarding a legal matter for which client seeks professional advice.

# Attorney-Client Privilege

- Two requirements:
  - The information/communication is between a client and his or her attorney
  - The information/communication is confidential

This privilege protects the two-way communication between an attorney and his or her client

# Personal Privacy Exemptions

- Two personal privacy exemptions under the FOIA--Exemptions 6 and 7(C)
- The same 4-step analysis used under both exemptions:
  - Which exemption applies?
  - Is there a legitimate privacy interest?
  - Is there a qualified public interest?
  - Balance the two interests



# Personal Privacy Exemptions

- If the privacy interest is greater than any qualified public interest, then you should withhold the information.
- If the public interest is greater than any legitimate privacy interest, then you should release the information
- Glomar response:
  - Identifiable individual
  - Records of a particularly sensitive nature
  - Used with both exemptions

# Exemption 6

5 U.S.C. § 552(b)(6) protects information found in “personnel and medical and similar files,” the disclosure of which would constitute a clearly unwarranted invasion of personal privacy

Threshold: Information is found in personnel, medical and “similar” files--a “similar” file is a type of file that you might find in an agency



# Exemption 6

- The privacy interest is the living individual's interest in controlling the dissemination of information about him or herself.
- The public interest must serve the FOIA's core purpose of shedding light on an agency's operations or activities
- Exemption 6 is the non-law enforcement privacy exemption



# Exemption 7

- 5 U.S.C. § 552(b)(7) protects information found in “records compiled for law enforcement purposes,” the disclosure of which would result in harm
- There are 6 sub-parts to Exemption 7, each of which addresses a specific harm in release





# Exemption 7

Threshold: “records or information compiled for law enforcement purposes”

- Recompilations of information
- “Law enforcement” under the FOIA--civil, criminal, administrative, regulatory;
- Mixed function agencies & Exemption 7D;

After you determine if Exemption 7 applies (i.e., you have a record compiled for law enforcement purposes), need to identify specific harm in release

# Exemption 7

- Exemption 7(A)-pending or prospective law enforcement proceeding, release could reasonably be expected to interfere;
- Exemption 7(B)-flip-side of 7(A), release would deny an individual right to fair trial;
- Exemption 7(C)-personal privacy exemption for law enforcement records--unwarranted invasion of personal privacy
- Exemption 7(D)-names of confidential sources and information provided

# Exemption 7

- Exemption 7(E)-investigative techniques and procedures or guidelines for law enforcement investigations (Use with (b)(2));
- Exemption 7(F)-danger to life or physical safety of any individual
- Exemption 8-financial institution records;
- Exemption 9-geological/geophysical data, including maps concerning wells